



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: TUNOI, GITHINJI & ONYANGO OTIENO, J.J.A

CIVIL APPEAL 29 OF 1999

BETWEEN

RAYTHEON AIRCRAFT

**CREDIT CORPORATION..... 1ST
APPELLANT**

**NAC AIRWAYS LIMITED..... 2ND
APPELLANT**

AND

**AIR AL-FARAJ LIMITED
RESPONDENT**

**(An appeal from the Ruling and Order of the High Court of Kenya at
Nairobi (Mbogholi, J) given on the 8**

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October, 1998

in

H.C.C.C. NO. 1611 OF 1998)

JUDGMENT OF GITHINJI, J.A.

The facts giving rise to this appeal are simple and not largely in dispute. They may briefly be stated as follows. By a Lease Purchase Agreement dated 2nd December, 1997, the 1st appellant, **RAYTHEON AIRCRAFT CREDIT CORPORATION**, (Raytheon) a company incorporated under the Laws of Kansas, United States of America, leased to the respondent, **AIR AL-FARAJ LIMITED**, a company duly incorporated in Kenya under the provisions of the Companies Act Cap 486 Laws of Kenya, an Aircraft Model Beechcraft 1900c Serial Number UC-144, Kenyan Registration Number 5Y BND under the terms and conditions provided therein.

The respondent then took possession of the said Aircraft in January, 1998. It is pleaded that on or about 19th June, 1998 the 2nd appellant purporting to act on behalf of the 1st appellant and without informing

the respondent and without due authority and legal cause flew the said Aircraft out of the jurisdiction of this Court and took it to South Africa. It is the respondent's case that it fulfilled and observed all the covenants of the contract and was not in breach of any term of the Lease Agreement. It is averred that the appellants were in breach of the Lease Purchase Agreement and claimed against them its rights to operate and have possession of the Aircraft. The prayers sought in the plaint are:

- 1. A mandatory injunction compelling the defendants to return the Aircraft to the jurisdiction of the court and to the lawful custody and possession of the plaintiff.**
- 2. A permanent Injunction restraining the defendants their agents, servants from selling, disposing of, charging, leasing, deregistering or in any way interfering with the plaintiff's right over the Aircraft.**
- 3. A declaration that the defendants in allegedly repossessing the Aircraft were not entitled to repossession in law.**

The appellants filed a defence in which they have instead blamed the respondent for breach of the terms of the Lease Agreement.

Alongside the plaint, the respondent filed an application by way of Chamber Summons under which an order was granted restraining the appellants jointly and severally from deregistering from Kenya Register the Aircraft the subject matter of the suit. The application was then listed for hearing inter partes before the superior court and the basic ground of opposition raised by the appellants was that that Court had no jurisdiction with respect to the matters, the subject of the application and suit. The appellants, in canvassing their preliminary objection, grounded their submissions on Clause 15:1 of the Lease Purchase Agreement which provides:

“15:1 Law and Jurisdiction: THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF KANSAS IN RELATION TO ANY DISPUTE ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT LESSEE HEREBY IRREVOCABLY AND UNCONDITIONALLY AGREES THAT ALL LEGAL PROCEEDINGS IN CONNECTION WITH THIS AGREEMENT SHALL BE BROUGHT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS LOCATED IN WICHITA, KANSAS, OR IN THE EIGHTEENTH JUDICIAL DISTRICT COURT OF SEDGWICK COUNTY, KANSAS AND LESSEE WAIVES ALL RIGHT TO A TRIAL BY JURY provided however that Lessor shall have the option, in its sole exclusive discretion, in addition to the two courts mentioned above, to institute legal proceedings against Lessee for repossession of the Aircraft in any jurisdiction where the aircraft may be located from time to time, or against Lessee for recovery of monies due to Lessor from Lessee, in any jurisdiction where Lessee maintains, temporarily or permanently, any assets. The parties hereby consent and agree to be subject to the jurisdiction of all the aforesaid courts and, to the greatest extent permitted by applicable law, the parties hereby waive any right to seek avoid the jurisdiction of the above courts on the basis of the doctrine of forum non conveniens”.

Mr. Muigai, then acting for the appellants in the superior court, submitted that the Lease Purchase Agreement having been executed by both the respondent and the 1st appellant it followed that *prima facie*, the above Clause, *inter alia*, is binding on the parties. He further contended that the respondent having waived all rights to bring an action in any other jurisdiction, renders the suit incompetent. Mr. Muigai argued that the institution of the suit violated the contract between the parties and is an abuse of the process of the court.

In countering the preliminary objection Mr. Ahmednasir for the respondent submitted that the jurisdiction of the superior court as conferred by section 60 of the Constitution of Kenya cannot be limited by a contract between two parties and even by an Act of Parliament. He averred that the contract was one-sided and that the choice of law and forum was forced onto the respondent. He maintained that there was no arms-length negotiation and there cannot be said to have existed freedom of contract considering the

business position of the 1st appellant vis-à-vis that of the respondent.

The learned Judge in overruling the preliminary objection raised by the appellants held:

“Earlier in this ruling I set out in full Clause 15:1 of the Lease Purchase Agreement. While the said Clause imposed a total waiver of all rights on the part of the plaintiff as to choice of law and forum, the 1st defendant gave itself unlimited jurisdiction thereof. The terms thereof appear with respect to be tinctured with oppression. There (sic) being preliminary proceedings, I say no more. Suffice it to say that taking into consideration the facts herein, the attendant circumstances and above all, the provisions of Section 60(1) of the Kenya Constitution, I find and hold that this Court has jurisdiction to hear and determine this suit.

Accordingly, the preliminary objection is hereby dismissed with costs to the plaintiff”

. The grounds of appeal before us are directed against the learned Judge’s decision that, firstly; the choice of law and choice of forum Clause in the Lease Agreement between the parties was tinctured with oppression when there was no evidence on record in support thereof; and secondly, that the original jurisdiction of the High Court under **Section 60** of the constitution overrides choice of jurisdiction Clauses under all circumstances. Indeed, the respondent averred in paragraph 11 of the plaint:

“This Honourable court being a creation of the Kenya Constitution which is the supreme law of the land has absolute jurisdiction to determine the dispute, the provision of the lease Agreement notwithstanding”.

Mr. Ahmednasir, submitted in the superior court and the learned Judge agreed with him that **section 60 (1)** of the Constitution which gives the High Court unlimited jurisdiction in both civil and criminal matters is peculiar to our jurisdiction and that a written contract between the parties cannot supersede the express provision of the constitution. This Court considered that issue of jurisdiction in Civil Application No. Nai. 326 of 1998 Raytheon Aircraft Credit Corporation & Another vs. Air Alfaraj Limited when dealing with an application for stay of proceedings in the superior court pending this appeal and said in part:

“The learned judge’s reliance on what Kuloba, J. said in the case of Pattni vs. Ali & 2 Others HCCC No. 418 of 1998), (unreported) as regards High Court’s jurisdiction as donated by section 60 (1) of the Constitution was in our view, out of place and not germane to the issue before him. Convenience of the plaintiff, alone, in choosing his forum cannot by itself oust a jurisdiction and the applicable law clause. Strong cause must be shown to justify a departure from the jurisdiction and applicable law clause, and the onus of showing such strong cause lies on the plaintiff”

. I do not with respect, agree with the construction given by the superior court to **section 60 (1)** of the Constitution. That section does not authorize the High Court to disregard private international law on the status of the choice of law and exclusive jurisdiction clauses in international commercial agreements and assume jurisdiction over persons outside Kenya.

The law on the jurisdiction of the High Court over foreign defendants in a contractual dispute was correctly stated by the predecessor of this Court in ***Karachi Gas Co. Ltd v Issaq*** [1965] EA 42 which case was recently applied by the High Court in ***Fonville v Kelly III & Others*** [2002] 1 EA 71. The first appellant Raytheon is a foreign corporation incorporated under the laws of Kansas, USA, and having its registered office in Kansas. It was not trading within the jurisdiction by a subsidiary company at the time it was sued and it is not domiciled in Kenya. In such a case, the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in **order V rule 21 (e)** Civil Procedure Rules, that is, inter alia, the contract www.kenyalaw.org Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited [2005] eKLR 6 is made in Kenya or if it is governed by the Laws of Kenya or if a breach of contract is committed in Kenya. The High Court assumes

jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under order V rule 23 and after such summons are served in accordance with the machinery stipulated therein. In this particular case, as USA is not a Commonwealth country, service on the first appellant if leave was given could only have been through diplomatic channel under **Rule 27 of Order V**. The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such leave was given. It follows that at the time the objection to jurisdiction was made, the High Court had not been moved to assume jurisdiction over **Raytheon** and had not in fact assumed jurisdiction over **Raytheon**. Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone.

Moreover, even if the High Court assumes jurisdiction over a foreign defendant by granting leave to serve summons or notice of summons outside Kenya, the foreign defendant is still entitled, as it happened in this case, to challenge the jurisdiction of the High Court. The first appellant based the objection to the jurisdiction on the choice of law and exclusive jurisdiction clause in the agreement. According to the choice of law and the exclusive jurisdiction clause, the proper law of contract in dispute is the law of the State of Kansas. The agreement has named two courts in the State of Kansas which have jurisdiction over the agreement. By the same clause the parties waived any right to seek to avoid the jurisdiction of the two courts on the basis of the doctrine of forum non conveniens.

The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum (see **Donohue v Armo Inc.** [2002] 4 LRC 478, H.L.; **The Elephtheria** [1969] 2 All ER 641, **United India Insurance Co. Ltd v East African Underwriters** (Kenya) Ltd [1985] KLR 898.

The learned Judge gave two reasons for declining to enforce the exclusive jurisdiction clause, first that the aircraft the subject matter of the agreement of lease had been registered in Kenya and secondly, because the exclusive jurisdiction clause gave **Raytheon** unlimited jurisdiction and the terms appeared to be tainted with oppression. On the question of the exclusive jurisdiction clause being oppressive to the respondent the learned Judge evidently had no sufficient material on which he could decide the issue. There was no affidavit evidence to show the full circumstances under which the agreement was made. It was a complex agreement between two companies involving the lease of an aircraft, a very expensive asset. **Raytheon** only reserved jurisdiction to sue in a non – contractual forum on two matters, that is to sue for repossession of the aircraft in the jurisdiction where it may be located and to sue for any monies due in the jurisdiction where the respondent may have assets. It is not therefore, entirely correct to say that Raytheon gave itself unlimited jurisdiction to sue over the agreement in any jurisdiction. Although the aircraft was registered in Kenya after it was delivered to the respondent, it had already been removed from the jurisdiction by the time the suit was filed. There is a further relevant matter that the learned Judge did not consider. The **Raytheon's** counsel, Peter Obonyo Mboya, deposed that Raytheon had on 15th July, 1998 commenced civil proceedings in Kansas against the respondent and served on the respondent's Process Agent under the agreement and annexed a petition dated 15th July, 1998. He deposed further that the Kansas proceedings were commenced before the proceedings in the High Court and that respondent's claim in the High Court should be made as a counter-claim in the Kansas proceedings. The petition shows that, amongst the reliefs sought by **Raytheon** in Kansas proceedings against the respondent and two others were declarations that that respondent had breached the agreement; that Raytheon was entitled to treat the breach as a repudiation of the lease agreement and to terminate the letting; that Raytheon had a right to repossess the aircraft and that the Kansas court had exclusive jurisdiction in the dispute to the exclusion of any other court.

The learned Judge did not take into account the existence and the nature of the Kansas proceedings nor consider the risk of parallel proceedings and inconsistent decisions if the forum selection and the exclusive jurisdiction clause was not enforced. The respondent did not show strong reasons why it should sue in Kenya. I am satisfied that in light of the above circumstances, the learned judge did not exercise his discretion properly and as a result arrived at a wrong decision. Thus, there are good grounds for interfering with the judge's exercise of discretion.

Lastly, Mr. Ahmednasir contended that since the appellant did not file a formal application for stay of proceedings, it cannot competently challenge the jurisdiction of the court through a preliminary objection. Mr. Mugambi, for the appellant, on the other hand, submitted that the appellant had asked for stay of proceedings in the amended notice of preliminary objection and that since there is no provision in our law for filing a formal application for stay of proceedings a point of jurisdiction can be entertained without a formal application. The point raised by the respondent's counsel was again considered by this Court in the application for stay of proceedings in **Raytheon Aircraft Credit Corporation & Another v Air Alfaraj Limited** (supra) where the Court stated:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of a pleading or an application before the court and which, if argued as a preliminary point, may dispose of the suit The superior court obviously had the jurisdiction to decide the preliminary point as, if successful, it could have gone to the very root of the matter. Whilst it would be prudent to make a formal application, the High Court has, nevertheless, jurisdiction to hear arguments and rule on a point such as was taken in the superior court”.

It is true that the appellant by paragraph 3 of the Amended Notice of preliminary objection asked that the proceedings be stayed.

There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in **Prabhadas (N) & Co. v Standard Bank** [1968] EA 679 at page 684 paragraphs C – E is to enter a conditional appearance and then move the court for setting aside the process. In **United India Insurance Co. Ltd** (supra), the defendants entered appearance under protest and moved the court for orders to stay proceedings. In **Fonville** case (supra) the High Court said that the filing of a defence under protest, the filing of an application for stay of proceedings or striking out the proceeding and the raising of a preliminary objection to the suit before trial are lawful means of challenging the jurisdiction of the court (see page 78 paragraphs I – j). In this case, the appellant had pleaded in the defence that that the court did not have jurisdiction in view of the exclusive jurisdiction clause and raised a preliminary objection to the suit on account of jurisdiction at a very early stage in the proceedings. I would reiterate what this Court said in the application for stay of proceedings (supra), that the High Court had jurisdiction to hear arguments and rule on the point of jurisdiction.

However, the procedures to be followed in this important area of litigation should no longer be left uncertain. I would recommend to the Rules Committee that appropriate comprehensive rules of procedure be urgently promulgated to facilitate the administration of justice.

For the foregoing reasons, I would allow the appeal and set aside the orders of the superior court and substitute therefore, an order that the High Court has no jurisdiction to hear and determine the suit; an order allowing the appellant's preliminary objection with costs and an order that the suit in the superior court is stayed. Costs of this appeal to the appellants.

Dated and delivered at Nairobi this 8th day of July, 2005.

E.M. GITHINJI

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JUDGMENT OF TUNOI, J.A.

I agree with the judgment prepared by Githinji, J.A. and have nothing useful to add. I also agree with orders proposed by him.

DATED and DELIVERED at NAIROBI this 8th day of July, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

JUDGMENT OF ONYANGO OTIENO J.A.

I have had the advantage of reading in draft, the judgment of Githinji, J.A. I fully agree with it. I do also agree with the orders proposed. I would not add anything to the judgment and to the same orders.

DATED and DELIVERED at NAIROBI this 8th day of July, 2005.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR